SERPLY SDN. BHD

v.

PROTEXA DRILLING (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C 867 OF 1983]
9 JUNE 1984

CIVIL PROCEDURE: *Order of attachment before judgment - Application to set aside - Failure to satisfy s. 19(1) Debtors Act - Failure to make full disclosure of material facts - Making of inaccurate statements.*

The defendants applied to set aside an order of attachment before judgment made against their property, namely, an account at Citi Bank, Medan Pasar Branch, Kuala Lumpur, for a sum not exceeding RM368,044.47. They also claimed damages suffered by them as a result of the attachment.

Held:

[1] The plaintiffs had not completely satisfied the requirements of s. 19(1) of the Debtors Act in their *ex-parte* application. (*Kepong Prospecting Ltd. v. Sehmidt* [1962] 28 MLJ 375).

(a) The plaintiffs had disclosed a good cause of action against the defendant, as required by s. 19(1) of the Debtors Act. There was a complete contract between the parties. The telex sent by the defendants to the plaintiffs on 19 November 1981 constituted an agreement to pay the plaintiffs commission for their services.

(b) However, the plaintiffs had failed to show a *prima facie* case against the defendants in respect of the second requirement of s. 19 of the Debtors Act. The question of the defendants running away from the jurisdiction of the Court did not arise. The defendants had served on the plaintiffs a notice before 15 April 1983 informing the latter of their intention to move to Singapore and could not have known of the plaintiffs' writ, which was filed on that date and served on the defendants on 3 May 1983.

[2] The plaintiffs had failed to disclose the true facts of the case by making inaccurate statements in their affidavit in support of the *ex-parte* application. The person making an *ex-parte* application should show the utmost good faith by not holding back any vital information touching upon matters pertinent to the application. Failure to do so is alone sufficient reason for the Court to discharge the order. (*Datuk Abu Mansor bin Mohamed Basir v. Bank Kerjasama Rakyat Malaysia Bhd. & Anor.* [1982] CLJ (Rep) 69; *Hari Singh v. Sundarammal* [1965] 2 MLJ 174 at p. 174 & 175).

[Attachment order set aside. Date to be fixed for assessment of damages suffered by defendants. Costs of application to be paid by plaintiffs in any event.]

Cases referred to:

Kepong Prospecting Ltd. v. Schmidt [1962] 28 MLJ 375
Datuk Abu Mansor bin Mohamed Basir v. Bank Kerjasama Rakyat Malaysia Bhd. & Anor. [1982] CLJ (Rep) 69
Hari Singh v. Sundarammal [1965] 2 MLJ 174

Legislation referred to:

Debtors Act 1957, s. 19(1)
Debtors Ordinance, s. 19(1)c

For the plaintiffs - Joseph Loo; M/s. Tunku Zuhri, Manan and Abdullah
For the defendants - William Leong M/s. Joseph Tan & Tang

JUDGMENT

Zakaria Yatim J:

This is an application by the defendants to set aside an order of attachment before judgment made against their property, namely, Bank Account No. 0-110355-017 at Citi Bank, Medan Pasar Branch, Kuala Lumpur for a sum not exceeding RM368,044.47. The defendants are also asking for damages suffered by them as a result of the attachment and for costs.

The defendants' application to set aside the attachment order is based on two main grounds:-

Firstly, the plaintiffs failed to satisfy the requirements of s. 19(1) of the Debtors Act; and, secondly, the plaintiffs, in their *ex-parte* application for the attachment order, had not fully disclosed material facts and had made inaccurate statements.

I shall now deal with the first ground. Section 19(1) of the Debtors Act states as follows:

> 19.(1) If it is shown to the satisfaction of the Court, at any time after the issue of a writ of summons, by evidence on oath, that the plaintiff has a good cause of action against the defendant, and:
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> (a) that the defendant is absent from the State and that his place of abode cannot be discovered;
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> (b) that service of a writ of summons cannot without great delay or difficulty be effected; or
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> (c) that the defendant, with intent to obstruct or delay the execution of any judgment which has been or may be made against him, has removed, or is about to remove, or has concealed, or is concealing, or making away with, or handing over to others, any of his movable or immovable property.
>
> the Court may order that the property of the defendant, or any part thereof, be forthwith seized or attached by the appropriate officer as a pledge or surety to answer the just demand of the plaintiff, until the trial of the action and satisfaction of any judgment that may be made against the defendant; but such order shall not constitute the plaintiff a secured creditor if the defendant is adjudicated bankrupt:

It has been held in the case of *Kepong Prospecting Ltd. v. Schmidt* [1962] 28 MLJ 375 that an applicant for an order under s. 19(1)(c) must satisfy the Court: (a) that he has a good cause of action and (b) that the defendant with intent to obstruct or delay the execution of any judgment has removed or is about to remove or has concealed or is concealing or making away with or handing over to others any of his movable or immovable property.

Mr. Leong, Counsel for the defendants submitted that the plaintiffs had failed to disclose a good cause of action in their *ex-parte* application. In their statement of claim, the plaintiffs' claim was based on an agreement contained in a telex sent by the defendants to the plaintiffs on 19 November 1981. The affidavit (encl. 2) in support of the *ex-parte* application also referred to the same telex which was exhibited as DM1. The telex reads:

> This will confirm our agreement that Protexa Drilling (Malaysia) Sdn. Bhd. will pay Serply Sendirian Berhad a Commission of one (1) percent of revenues received from Petronas Carigali Sdn. Bhd. contract number 281/60/018 for the services of the drillship Cora including the mobilization payments, day rate payments for the initial term and one year extension option, if exercised, and the demobilization payment.

We are drafting a formal agreement to this effect which we will submit for your review shortly.

According to Mr. Leong, the telex did not constitute an agreement because, in the second paragraph, it was stated that a formal agreement would be prepared for review by the plaintiffs. He said that a formal agreement was subsequently concluded and this formal agreement was attached to the defendants' affidavit (encl. 11) as Exhibit MS3. Also attached to the same affidavit were two other telexes exhibited as MS1 & MS2.

In my opinion the telex (DM1) is a complete agreement. The telex clearly states that the defendants would pay the plaintiffs one percent commission for their services. There was no formal agreement subsequently concluded between the plaintiff and the defendants. The agreement exhibited by the defendants, MS3, was concluded between the defendants and a third party, Bassoe Offshore Partners Ltd. and it made no reference to the one percent commission payable to the plaintiffs. Similarly, the two other telexes MS1 and MS2 made no reference to the amount of commission to be paid by the defendants to the plaintiffs. It was only in the affidavit of the defendants (encl. 11) that reference was made to the commission. Para. 7 of the affidavit stated that the defendants would pay the plaintiffs 0.82% through Bassoe Offshore Partners Ltd. and the other 0.18% would be paid to the plaintiffs upon the plaintiffs writing to the defendants' parent company at Houston, Texas, USA. This paragraph merely mentioned the mode of payment to be made by the defendants to the plaintiffs but it confirmed that the defendants had to pay the one percent commission to the plaintiffs. The defendants' affidavit (encl. 11) thus confirmed what is stated in the telex DM1 and it is my view that DM1 is a complete agreement. Since DM1 is a complete agreement, the plaintiffs, therefore, have a cause of action against the defendants to recover the commission money due to them.

With regard to the second requirement of s. 19 of the Act, the plaintiffs stated in their affidavit (encl. 2, para. 9) that "the defendants, with intent to obstruct or delay the execution of any judgment that may be made against them, are about to remove or making away with the handing over to others any of their assets." The reason for this allegation was that the defendants were in the process of making arrangements to cease business. In their affidavit in reply (encl. 15) the plaintiffs further stated that a notice issued by the defendants regarding the shifting of their office from Malaysia to Singapore prompted the plaintiffs to apply for the attachment order. The defendants, however, denied the allegation made by the plaintiffs. In their affidavit (encl. 11), they said that if there was any intention of obstructing or delaying the execution of judgment, such notice would not have been issued especially to the plaintiffs. A copy of the notice was exhibited as MS4. In the notice the defendants stated: "We wish to inform you that with effect from 15 April 1983 our new address will be" in Singapore. No date was given as to when this notice was issued but it must have been issued before 15 April 1983. It can be inferred, therefore, that the decision to move to Singapore was before the date stated in the notice. The writ (encl. 1) was filed on 15 April 1983. It was served on the defendants together with the attachment order on 3 May 1983. The defendants only came to know of the writ and the order when it was served on them. They could not have known of the writ when the notice to shift their office to Singapore was issued. Thus, the question of running away from the jurisdiction of the Court did not arise. The plaintiffs, therefore, failed to show a *prima facie* case against the defendants in respect of the second requirement of s. 19 of the Act.

I shall now turn to the second ground in support of the defendants' application, namely, that the plaintiffs had not fully disclosed material facts and had made inaccurate statements in their *ex-parte* application. In *Datuk Abu Mansor bin Mohamed Basir v. Bank Kerjasama Rakyat Malaysia Bhd. & Anor*. [1982] CLJ (Rep) 69, the Federal Court decided on an appeal arising from an *ex-parte* order of attachment before judgment under s. 19(1)(c) of the Debtors Ordinance.

Azmi J, as he then was, in delivering the Judgment of the Court, said:

> But this 1976 transfer, which could have been discovered from the Land Office Registry, was not disclosed to the learned Judge when the *ex-parte* order was made, and as such he could not have exercised his discretion on matters unknown to him...

Similarly, in *Hari Singh v. Sundarammal* [1965] 2 MLJ 174 @ 174 & 175, MacIntyre J said:

> It is also settled that on an *ex-parte* application, the person making the application should show the utmost good faith by not holding back any vital information touching upon matters pertinent to the application ... The failure to mention that fact when the application for an *ex-parte* order was made is alone sufficient reason for me to discharge the order...

In the instant case, the plaintiffs had failed to disclose the true facts by making inaccurate statements in the affidavit (encl. 2) in support of the *ex-parte* application. The plaintiffs alleged, in para. 9(d) of that affidavit, that the defendants' company had a paid-up capital of RM2. The defendants in their affidavit (encl. 11) stated that the paid-up capital of the defendant company was RM200,000. The plaintiffs in their affidavit in reply (encl. 15, para. 12) changed their story and stated that the authorised capital of the defendants' company was RM25,000. The failure of the plaintiffs to disclose the correct information in their *ex-parte* application is a good ground to discharge the attachment order.

For the reasons stated above, I order that:

(1) the order made by me on 26 April 1983 that the attachment before judgment be given against the defendants' property, namely Bank Account No. 0-110355-017 Citi Bank, Kuala Lumpur for a sum not exceeding RM368,044.47 be set aside;

(2) a date be fixed for the assessment of damages suffered by the defendants as a result of the attachment; and

(3) the costs of this application be paid by the plaintiffs in any event.

Also found at [1985] 1 CLJ 216